

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Plaintiff,

v.

CLIVEN D. BUNDY

Defendant.

Case No. 2:16-cr-00046-GMN-PAL

**ORDER  
-and-  
REPORT OF FINDINGS AND  
RECOMMENDATION**

(Mot. Dismiss – ECF No. 891)

Before the court is Defendant Cliven D. Bundy's ("Cliven Bundy") Motion to Dismiss for Violation of the Speedy Trial Act Pursuant to 18 U.S.C. §§ 3161, 3162, and the Sixth Amendment to the U.S. Constitution and/or For Denial of Right to Counsel (ECF No. 891) which was referred for a Report of Findings of Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB1-4 of the Local Rules of Practice. The court has considered the Motion, the Government's Consolidated Response (ECF No. 984), and Cliven Bundy's Reply (ECF No. 1036). Also before the court is Cliven D. Bundy's Second Motion to Continue Rule 12 Motion Filing Deadline (ECF No. 889).

**BACKGROUND**

**I. The Indictment**

Defendant Cliven Bundy and 18 co-defendants are charged in a Superseding Indictment (ECF No. 27) returned March 2, 2016. Cliven Bundy is charged in 16 counts with:

- Count One – Conspiracy to commit an offense against the United States in violation of 18 U.S.C. § 371. This charge arises from conduct that allegedly occurred sometime between March of 2014 and March 2, 2016.
- Count Two – Conspiracy to impede or injure a federal officer in violation of 18 U.S.C. § 372. This charge arises from conduct that allegedly occurred sometime between March of 2014 and March 2, 2016.

- 1 • Count Three – Use and carry of a firearm in relation to a crime of violence in violation of  
2 18 U.S.C. § 924(c) and § 2. This charge arises from conduct that allegedly occurred  
sometime between March of 2014 and March 2, 2016.
- 3 • Count Four – Assault on a federal officer in violation of 18 U.S.C. § 111(a)(1), (b) and § 2.  
4 This charge arises from conduct that allegedly occurred on April 9, 2014.
- 5 • Count Five – Assault on a federal officer in violation of 18 U.S.C. § 111(a)(1), (b) and § 2.  
6 This charge arises from conduct that allegedly occurred on April 12, 2014.
- 7 • Count Six – Use and carry of a firearm in relation to a crime of violence in violation of 18  
8 U.S.C. § 924(c) and § 2. This charge arises from conduct that allegedly occurred on April  
9 12, 2014.
- 10 • Count Seven – Threatening a federal law enforcement officer, in violation of 18 U.S.C.  
11 § 115(a)(1)(B) and § 2. This charge arises from conduct that allegedly occurred on April  
12 11, 2014.
- 13 • Count Eight – Threatening a federal law enforcement officer in violation of 18 U.S.C.  
14 § 115(a)(1)(B) and § 2. This charge arises from conduct that allegedly occurred on April  
15 12, 2014.
- 16 • Count Nine – Use and carry of a firearm in relation to a crime of violence in violation of  
17 18 U.S.C. § 924(c) and § 2. This charge arises from conduct that allegedly occurred on  
18 April 12, 2014.
- 19 • Count Ten – Obstruction of the due administration of justice in violation of 18 U.S.C.  
20 § 1503 and § 2. This charge arises from conduct that allegedly occurred on April 6, 2014.
- 21 • Count Eleven – Obstruction of the due administration of justice in violation of 18 U.S.C.  
22 § 1503 and § 2. This charge arises from conduct that allegedly occurred on April 9, 2014.
- 23 • Count Twelve – Obstruction of the due administration of justice in violation of 18 U.S.C.  
24 § 1503 and § 2. This charge arises from conduct that allegedly occurred on April 12, 2014.
- 25 • Count Thirteen – Interference with interstate commerce by extortion in violation of 18  
26 U.S.C. § 1951 and § 2. This charge arises from conduct that allegedly occurred between  
April 2, 2014, and April 9, 2014.
- 27 • Count Fourteen – Interference with interstate commerce by extortion in violation of 18  
28 U.S.C. § 1951 and § 2. This charge arises from conduct that allegedly on April 12, 2014.
- Count Fifteen – Use and carry of a firearm in relation to a crime of violence in violation of  
18 U.S.C. § 924(c) and § 2. This charge arises from conduct that allegedly occurred on  
April 12, 2014.
- Count Sixteen – Interstate travel in aid of extortion in violation of 18 U.S.C. § 1952 and  
§ 2. This charge arises from conduct that allegedly occurred sometime between April 5,  
2014 and April 12, 2016.

The Superseding Indictment (ECF No. 27) in this case arises out of a series of events related to a Bureau of Land Management (“BLM”) impoundment of Cliven Bundy’s cattle

1 following a two-decade-long battle with the federal government. Beginning in 1993, Cliven  
2 Bundy continued to graze cattle on land commonly referred to as the “Bunkerville Allotment”  
3 without paying required grazing fees or obtaining required permits. The United States initiated  
4 civil litigation against Cliven Bundy in 1998 in the United States District Court for the District of  
5 Nevada. The court found that Cliven Bundy had engaged in unauthorized and unlawful grazing  
6 of his livestock on property owned by the United States and administered by the Department of  
7 the Interior through the BLM. The court permanently enjoined Cliven Bundy from grazing his  
8 livestock on the Allotment, ordered him to remove them, and authorized the BLM to impound any  
9 unauthorized cattle. Bundy did not remove his cattle or comply with the court’s order and  
10 injunction. The United States went back to court. Subsequent orders were entered in 1999 and  
11 2013 by different judges in this district permanently enjoining Bundy from trespassing on the  
12 Allotment and land administered by the National Park Service (“NPS”) in the Lake Mead National  
13 Recreation Area,<sup>1</sup> ordering Bundy to remove his cattle, and explicitly authorizing the United States  
14 to seize, remove, and impound any of Bundy’s cattle for future trespasses, provided that written  
15 notice was given to Bundy.

16 On February 17, 2014, the BLM entered into a contract with a civilian contractor in Utah  
17 to round up and gather Bundy’s trespass cattle. BLM developed an impoundment plan to establish  
18 a base of operations on public lands near Bunkerville, Nevada, about 7 miles from the Bundy ranch  
19 in an area commonly referred to as the Toquop Wash. On March 20, 2014, BLM also entered into  
20 a contract with an auctioneer in Utah who was to sell impounded cattle at a public sale. Bundy  
21 was formally notified that impoundment operations would take place on March 14, 2014. The  
22 following day, Bundy allegedly threatened to interfere with the impoundment operation by stating  
23 publicly that he was “ready to do battle” with the BLM, and would “do whatever it takes” to protect  
24 “his property.” The superseding indictment alleges that after being notified that BLM intended to  
25 impound his cattle, Bundy began to threaten to interfere with the impoundment operation, and  
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27 <sup>1</sup> By 2012, Bundy’s cattle had multiplied and he also began grazing his cattle on land administered by the  
28 NPS in the Lake Mead National Recreation Area without obtaining grazing permits or paying grazing fees.

1 made public statements he intended to organize people to come to Nevada in a “range war” with  
2 BLM and would do whatever it took to protect his cattle and property.

3 The superseding indictment alleges that, beginning in March 2014, the 19 defendants  
4 charged in this case planned, organized, conspired, led and/or participated as followers and  
5 gunmen in a massive armed assault against federal law enforcement officers to threaten, intimidate,  
6 and extort the officers into abandoning approximately 400 head of cattle owned by Cliven Bundy.  
7 The removal and impoundment operation began on April 5, 2014. On April 12, 2014, defendants  
8 and hundreds of recruited “followers” executed a plan to recover the cattle by force, threats, and  
9 intimidation. Defendants and their followers demanded that officers leave and abandon the cattle  
10 and threatened to use force if the officers did not do so. The superseding indictment alleges armed  
11 gunmen took sniper positions behind concrete barriers and aimed their assault rifles at the officers.  
12 Defendants and their followers outnumbered the officers by more than 4 to 1, and the potential  
13 firefight posed a threat to the lives of the officers, as well as unarmed bystanders which included  
14 children. Thus, the officers were forced to leave and abandon the impounded cattle.

15 After the April 12, 2014 confrontation with federal officers, the superseding indictment  
16 alleges that the leaders and organizers of the conspiracy organized armed security patrols and  
17 check points in and around Cliven Bundy’s Bunkerville ranch to deter and prevent any future law  
18 enforcement actions against Bundy or his co-conspirators, and to protect Bundy’s cattle from  
19 future law enforcement actions.

## 20 **II. Procedural History**

21 Cliven Bundy was initially arrested on February 11, 2016, in the District of Oregon on a  
22 criminal Complaint (ECF No. 1) and warrant issued in this district. An Indictment (ECF No. 5)  
23 was returned February 17, 2016, charging Bundy and co-defendants Ryan Bundy, Ammon Bundy,  
24 Ryan Payne, and Peter Santilli with 16 felony counts. A Superseding Indictment (ECF No. 27)  
25 was returned March 2, 2016. All 19 defendants made their appearances in this case in this district  
26 between March 4, 2016, and April 15, 2016. At the initial appearance of each defendant, the  
27 government stated its position that this was a complex case that would require special scheduling  
28 review. All 19 defendants are currently joined for trial pursuant to the provisions of the Speedy

1 Trial Act, 18 U.S.C. §§ 3161–3174 (“Speedy Trial Act” or “STA”). All 19 defendants have been  
2 detained pending trial.

3 In an Order (ECF No. 198) entered March 25, 2016, the court directed the parties to meet  
4 and confer as required by LCR 16-1 to discuss whether this case should be designated as complex,  
5 and, if so, to attempt to arrive at an agreed-upon complex scheduling order addressing five  
6 specified topics for discussion. The order gave the parties until April 18, 2016, to file a stipulated  
7 proposed complex case schedule if all parties were able to agree, or if they were not, to file a  
8 proposed schedule with supporting points and authorities stating each party’s position with respect  
9 to whether or not the case should be designated as complex, a proposed schedule for discovery,  
10 pretrial motions, and trial, and any exclusions of time deemed appropriate under the STA.

11 A Proposed Complex Case Schedule (ECF No. 270) was filed on April 18, 2016. In it, the  
12 government and 13 of the 19 defendants agreed that the case should be designated as complex.  
13 The 13 defendants who stipulated to the proposed schedule included: Cliven Bundy, Mel Bundy,  
14 Dave Bundy, Blaine Cooper, Gerald Delemus, O. Scott Drexler, Richard Lovelien, Steven Stewart,  
15 Todd Engel, Gregory Burleson, Joseph O’Shaughnessy, Micah McGuire and Jason Woods. Three  
16 defendants, Ammon Bundy, Peter Santilli, and Brian Cavalier, indicated that they would “defer  
17 the decision to agree or disagree, pending further consultation with counsel and/or have taken no  
18 position as to the filing of this pleading.” Three defendants, Ryan Bundy, Eric Parker, and Ryan  
19 Payne, disagreed that the case should be designated as a complex case “to the extent time is  
20 excluded under the STA.”

21 The same 13 defendants who initially stipulated that the case should be designated as  
22 complex, agreed that the May 2, 2016 trial date should be vacated, and that the trial in this matter  
23 should be set on the first available trial track beginning “in or around February 2017.” Three  
24 defendants, Ammon Bundy, Peter Santilli, and Brian Cavalier, “deferred the decision to agree or  
25 disagree about a trial date pending further consultation with counsel, or have not taken a position.”

26 The 13 defendants who stipulated the case should be designated as complex and a trial date  
27 set in February 2017, stipulated “that all time from the entry of Defendants’ pleas in this case until  
28 the trial of this matter is excluded for purposes of the STA pursuant to 18 U.S.C. § 3161(h)(7)(A)

1 as the ends of justice outweigh the interest of the public and the defendants in a speedy trial.”  
2 Ammon Bundy, Peter Santilli and Brian Cavalier “deferred the decision to agree or disagree about  
3 the exclusion of time, pending further consultation with counsel, or have taken no position on the  
4 matter.” Ryan Bundy stated he disagreed “to the extent any exclusion of time denies him the right  
5 to a speedy trial under the STA.” Eric Parker stated he disagreed “with no further position stated.”  
6 Ryan Payne stated he disagreed “with the exclusion of time to the extent it denies him the right to  
7 a speedy trial under the STA.”

8 The court held a scheduling and case management conference on April 22, 2016, to  
9 determine whether this case should be designated as complex. Eighteen of the nineteen defendants  
10 appeared with their counsel. Defendant Ryan Bundy appeared pro se with standby counsel, Angela  
11 Dows. At the scheduling and case management conference on April 22, 2016, many of the  
12 defendants who had initially stipulated to the complex case schedule and a February 2017 trial  
13 date, changed positions. The positions of each of the defendants were stated on the record at the  
14 hearing and memorialized in the court’s Case Management Order (ECF No. 321) entered April 26,  
15 2016. The court found the case was a complex case within the meaning of 18 U.S.C.  
16 § 3161(h)(7)(B)(ii), and set the trial for February 6, 2017. The case management order made  
17 findings concerning why this case was deemed complex within the meaning of 18 U.S.C.  
18 § 3161(h)(7)(B), and the court’s findings on exclusion of time for purposes of the STA. The case  
19 management order also set deadlines for filing motions to sever, motions for filing pretrial motions  
20 and notices required by Rule 12, and LR 12(1)(b). No defendant filed objections to the  
21 determination that this case was complex, the court’s Speedy Trial Act tolling and exclusion  
22 findings, or any other provision of the court’s case management order.

### 23 **III. The Parties’ Positions**

#### 24 **A. The Motion to Dismiss**

25 Cliven Bundy seeks an order dismissing the indictment in this case against him pursuant  
26 to 18 U.S.C. § 3162(a)(2) for violation of the Speedy Trial Act. He also argues the superseding  
27 indictment should be dismissed because he has been denied counsel of his choice for his criminal  
28 legal defense team for the past eight months. He argues he has lost eight months of trial preparation

1 and the trial is scheduled for only four months from now. At the time the motion was filed, he was  
2 in the process of obtaining new counsel to replace Joel Hansen after the court barred his additional  
3 counsel of choice, Larry Klayman. He argues that the district judge did not provide a valid basis  
4 for refusing to admit Mr. Klayman *pro hac vice*. Time is ticking for Cliven Bundy to have a  
5 defense team in place. The court set a deadline for filing motions which passed before Cliven  
6 Bundy could confirm substitute counsel for Mr. Hansen who was forced to withdraw for health  
7 reasons. Although the court granted an extension of the deadline for filing motions to  
8 accommodate substitute counsel, the absence of Mr. Klayman has severely handicapped Bundy's  
9 defense and forced new counsel to "scramble to familiarize himself with this complex case in less  
10 than a week prior to the October 17, 2016 motion filing deadline."

11 The court's denial of Mr. Klayman's *pro hac vice* application, Bundy argues, has denied  
12 him of his Sixth Amendment right to counsel of his choice, and defects in his prosecution resulting  
13 from the lack of a criminal defense team of his choosing cannot be remedied on appeal. The court  
14 should therefore dismiss the superseding indictment for violation of his Sixth Amendment rights  
15 to counsel of his own choosing.

16 Bundy also asks the court dismiss the superseding indictment because the trial in this case  
17 is set for February 2017, more than a year after his arrest, and far in excess of the 70 days after the  
18 superseding indictment was filed against him. Under 18 U.S.C. § 3161, a trial is required to  
19 commence within 70 days from the filing of the information or indictment, or from the date the  
20 defendant first appeared before a judicial officer of the court in which the charge is pending,  
21 whichever occurs last. Trial is scheduled to take place at least 327 days after his arraignment on  
22 March 10, 2016. The delay in bringing this case to trial was made at the prosecutor's request.  
23 Although at first defense counsel for many of the 19 defendants acquiesced to the delay in trial,  
24 and to designate the case as complex, the conduct of the government prosecutors caused them to  
25 revoke their consent and demand a speedy trial.

26 Bundy argues that none of the exclusions or exceptions to 18 U.S.C. § 3161(d)-(k) apply  
27 in this case. Therefore, 18 U.S.C. § 3162(a)(2) mandates dismissal of the charges.  
28



1 The Ninth Circuit has held that a one-year delay is presumptively prejudicial. Bundy also  
2 argues that he is entitled to dismissal of the superseding indictment for violation of his Sixth  
3 Amendment right to a speedy trial. He argues he can meet the four-factor test the Supreme Court  
4 articulated in *Barker v. Wingo*, 407 U.S. 514 (1972). He was indicted in February 2016, and trial  
5 has been set for February 2017, a year after his indictment and arrest. The delay is wholly  
6 attributable to the government and Mr. Bundy has not done anything to cause delay outside of  
7 filing a single pro hac vice motion which was still on appeal to the Ninth Circuit at the time this  
8 motion was filed. The delay has severely prejudiced him because he has been in “solitary  
9 confinement and will continue to be confined in that manner.” The court should therefore dismiss  
10 the superseding indictment with prejudice against refiling charges in the future.

#### 11 **B. The Government’s Consolidated Response**

12 The government filed a single response to Cliven Bundy’s Motion to Dismiss for  
13 Violations of the Speedy Trial Act and Second Motion for a Continuance of the Deadline for Filing  
14 Rule 12 Motions. The government argues that Bundy is taking inconsistent positions by claiming  
15 violations of his Sixth Amendment right to counsel and violations of the Speedy Trial Act while  
16 at the same time arguing he needs more time to file pretrial motions. The government opposes  
17 any further enlargement of time to file pretrial motions.

18 Following a case management hearing on April 22, 2016, the court entered a case  
19 management order, which vacated the May 2, 2016 trial setting and set the trial for February 6,  
20 2017, for all of the defendants. The order made specific findings regarding exclusions of time  
21 under the Speedy Trial Act, excluding all of the time between arraignment and the February 2017  
22 trial date. The case management order also set dates for production of discovery and pretrial  
23 motions. On July 6, 2016, Bundy filed an emergency petition with the Ninth Circuit for a writ of  
24 mandamus requesting that the district court be ordered to admit Klayman pro hac vice. On  
25 September 23, 2016, Joel Hansen filed a motion to withdraw as counsel stating his health concerns  
26 and need to schedule surgery near the time of trial would interfere with his ability to represent Mr.  
27 Bundy.  
28



1           The court held a hearing on the motion to withdraw on September 29, 2016, at which both  
2 Mr. Hansen and Mr. Bundy were present. Attorney Warren Markowitz was present at defense  
3 counsel table as a potential replacement for Mr. Hansen. The court granted Hansen's motion to  
4 withdraw subject to a 30-day transition period. Counsel for Mr. Bundy requested a two-week  
5 extension of time to file his pretrial motions which were then due on October 3, 2016, indicating  
6 there was one substantive motion he expected to file on Bundy's behalf. The court granted this  
7 request and extended the deadline to October 17, 2016, and also granted Mr. Bundy two weeks to  
8 obtain new counsel. On October 12, 2016, the day before the hearing to confirm new counsel,  
9 Attorney Hansen sent the court a letter advising that Attorney Bret Whipple would be making an  
10 appearance as co-counsel during the 30-day period in which attorney Hansen would continue to  
11 represent Bundy.

12           On October 13, 2016, Mr. Hansen did not appear. However, attorney Bret Whipple  
13 appeared with Mr. Bundy representing he was entering an appearance for the limited purpose of  
14 assisting in the filing of pretrial motions. Cliven Bundy did not submit a financial affidavit as the  
15 court directed if he intended to request court-appointed counsel. An unsigned financial affidavit  
16 that had been submitted on his behalf was reviewed and the court indicated it did not appear he  
17 qualified for court-appointed counsel based on his significant assets. After canvassing Bundy and  
18 Attorney Whipple, the court continued the hearing until October 21, 2016, to allow Mr. Bundy and  
19 Mr. Whipple to finalize a retention agreement. The court reminded Mr. Bundy that he needed to  
20 resolve this issue because the case was currently set for trial with his co-defendants who were  
21 asserting their right to go to trial as currently scheduled. Mr. Whipple advised the court that he  
22 felt comfortable he would be able to meet the motion deadline of October 17, 2016, as Mr. Bundy  
23 had been provided with a copy of a draft motion for his final approval. These two motions were  
24 filed October 17, 2016.

25           At the continued October 21, 2016 hearing to confirm counsel, Attorney Jeb Bond appeared  
26 for Mr. Whipple on Mr. Bundy's behalf. Mr. Bundy was present. During the hearing, Attorney  
27 Bond represented to the court that negotiations for retention were nearly complete. The court  
28 granted counsel's request for a continuation of the hearing until October 26, 2016, to enable

1 counsel to finalize their agreement. On October 24, 2016, Attorney Whipple filed a Notice of  
2 Attorney Appearance in which he stated he had been retained by Cliven Bundy “for the purpose  
3 of full representation through the duration of trial.” The court therefore vacated the October 26,  
4 2016 hearing.

5 On October 28, 2016, the Ninth Circuit denied Bundy’s request for a writ of mandamus to  
6 grant Klayman’s pro hac vice petition. Cliven Bundy filed an emergency petition requesting a  
7 hearing en banc. In the emergency petition, Bundy filed a declaration under penalty of perjury  
8 stating that although Bret Whipple had entered an appearance, he had not finalized his retention of  
9 him, and he had not yet been paid a retainer.

10 The government argues that Bundy has not been denied any Sixth Amendment right to  
11 counsel based on the court’s denial of the pro hac vice application, which the Ninth Circuit has  
12 now affirmed. The Ninth Circuit found that Mr. Klayman’s extensive history of egregious conduct  
13 was more than sufficient to deny his petition to appear pro hac vice in this case, and that no Sixth  
14 Amendment violation occurred.

15 The government also asserts that there has been no violation of Bundy’s Sixth Amendment  
16 right to a speedy trial. The February 6, 2017 trial date is presumptively timely under the Sixth  
17 Amendment. Bundy was arrested February 11, 2016, and his trial will proceed February 6, 2017,  
18 less than one year from his arrest. The trial date comports with the Speedy Trial Act, which  
19 recognizes that criminal prosecutions vary widely and there are valid reasons for greater delay in  
20 particular cases. The case management order in this case excluded all time between the  
21 arraignment of the last co-defendant, and the currently scheduled trial date of February 6, 2017,  
22 citing the exclusions under 18 U.S.C. §§ 3161(h)(7)(A) and (h)(8)(B)(1)(i) and (ii). Bundy’s  
23 motion to dismiss ignores these findings and fails to acknowledge that his own petition for a writ  
24 of mandamus has, alone, tolled all time between July 6, 2016, and the date the government’s  
25 response was filed under 18 U.S.C. § 3161(h)(1)(C).

26 The government maintains that this case was appropriately designated as complex.  
27 Attorney Joel Hansen’s health issues are not acts that are attributable to the United States. Bundy  
28 has spent months litigating whether attorney Klayman should be admitted as counsel in this case

1 “seemingly refusing to focus on the case at bar.” The government argues that a defendant who is  
2 not ready for pretrial motions is also not ready for trial. Yet, Mr. Bundy moves for a rehearing en  
3 banc of the denial of his petition for a writ of mandamus, pursuing what could be months of  
4 briefing and argument before a higher court. This also demonstrates that he is not ready for trial.  
5 The government believes his motion to dismiss is not made in good faith, but as a means to “game  
6 the system” by pressing for a speedy trial on the one hand, while claiming that he is not ready for  
7 trial on the other. The government therefore asks that the court deny both motions.

### 8 **C. Bundy’s Reply**

9 Cliven Bundy’s reply disputes that his two motions are contradictory or inconsistent. Mr.  
10 Bundy was denied his chance to have a speedy trial which is an error warranting dismissal.  
11 However, since that ship has now sailed, he asks the court to either dismiss the case against him,  
12 or grant him more time to file pretrial motions given the short time he has now had his fully-  
13 retained trial counsel. Counsel advises that he “absolutely does not expect to file any additional  
14 motions which would jeopardize the February 6, 2017 trial date.” The motion to extend the  
15 deadlines was filed out of an abundance of caution because current counsel had just come into the  
16 case and wished to preserve the right to present pretrial motions challenging evidentiary or  
17 discovery issues.

## 18 **DISCUSSION**

### 19 **I. Applicable Standards**

20 The Sixth Amendment guarantees the accused the right to a speedy trial. The Sixth  
21 Amendment right to a speedy trial is a fundamental right that serves to: (1) “prevent undue  
22 oppressive incarceration prior to trial”; (2) “minimize anxiety and concern accompanying public  
23 accusation”; and (3) “limit the possibilities that long delay will impair the ability of the accused to  
24 [present a defense].” *United States v. Ewell*, 383 U.S. 116, 120 (1966). The Supreme Court has  
25 established a four-factor test to determine challenges to a defendant’s Sixth Amendment speedy  
26 trial rights: (1) whether the delay was uncommonly long; (2) whether the government or the  
27 defendant was responsible for the delay; (3) whether the defendant has asserted his or her right to  
28 a speedy trial; and (4) whether the Defendant suffered prejudice. *Doggett v. United States*, 505

1 U.S. 647, 651 (1992). This four-factor test was first announced in *Barker v. Wingo*, 407 U.S. 514  
 2 (1972), which found that none of the four factors is “either a necessary or sufficient condition to  
 3 the finding of a deprivation of the right of speedy trial.” *Id.* at 530–33 (holding that a five-year  
 4 delay in bringing a case to trial did not violate a defendant’s speedy trial right).

5 The Ninth Circuit considers a delay in excess of one year as “presumptively prejudicial.”  
 6 *United States v. Murillo*, 288 F.3d 1126, 1132–33 (9th Cir. 2002). The complexity of the case and  
 7 nature of the charges are factors the court considers in determining whether delay in particular  
 8 cases violates a defendant’s Speedy Trial Act. *See, e.g., United States v. Saenz*, 623 F.3d 461, 464  
 9 (7th Cir. 2010) (finding no speedy trial violation because the case was complex and involved a  
 10 conspiracy case with 19 co-defendants); *United States v. Brown*, 498 F.3d 523, 531 (6th Cir. 2007)  
 11 (finding no speedy trial violation because complex case involved multiple crimes, defendants, and  
 12 events occurring in multiple states); *United States v. King*, 483 F.3d 969, 976 (9th Cir. 2007)  
 13 (finding no speedy trial violation because the case involved a complex conspiracy, multiple  
 14 defendants, and defendant substituted new counsel halfway through it); *United States v. Register*,  
 15 182 F.3d 820, 827 (11th Cir. 1999) (finding no speedy trial violation because of the complex nature  
 16 of the case involving multiple defendants).

## 17 **II. Analysis and Decision.**

18 Mr. Bundy claims the indictment should be dismissed because his Sixth Amendment right  
 19 to a speedy trial and to counsel of his choice have been violated. The Ninth Circuit has now heard  
 20 and ruled on Mr. Bundy’s petition for writ of mandamus challenging the district judge’s denial of  
 21 attorney Larry Klayman’s application for admission pro hac vice. In a 35-page published opinion  
 22 the Ninth Circuit held that “the district court had more than ample cause to turn down Klayman’s  
 23 application” for reasons described at length. *See In re Bundy*, 840 F.3d 1034 (9th Cir. 2016).

24 Additionally, Bundy has been represented by counsel throughout this prosecution, and has  
 25 never been without counsel in this case. On September 23, 2016, attorney Joel Hansen moved to  
 26 withdraw as counsel for Mr. Bundy shortly before the October 3, 2016 deadline for filing pretrial  
 27 motions, citing his back problems and need for surgery. The court set the matter for hearing on  
 28 September 29, 2016, and canvassed Mr. Hansen at some length about why he was moving to

1 withdraw, whether back surgery had been scheduled, and if his health problems were causing him  
2 to move to withdraw from other cases. Mr. Hansen's surgery had not been scheduled, and he told  
3 the court it was because he was seeking necessary insurance company approval. He also told the  
4 court that he was not seeking to withdraw from other cases. However, he was seeking to withdraw  
5 from representing Mr. Bundy because he had been in other federal trials and did not believe he  
6 could physically withstand the rigors of a multi-week trial with the full-day schedules that federal  
7 judges typically follow. He did not think he was physically capable of sitting and standing for  
8 prolonged periods of time. Attorney Warren Markowitz appeared with Mr. Hansen at the  
9 September 29, 2016 hearing and was introduced as an out of state attorney Mr. Hansen knew, had  
10 confidence in, and thought might be willing to represent Mr. Bundy. The court inquired whether  
11 Mr. Hansen was prepared to timely file pretrial motions. He told the court that he had been  
12 thinking of pretrial motions to file on behalf of Mr. Bundy and "had a motion in mind" challenging  
13 federal jurisdiction but had not yet prepared the motion. He believed he could file it by the October  
14 3, 2016 deadline. However, the court, *sua sponte* granted a two-week extension until October 17,  
15 2016, for counsel for Bundy to file pretrial motions.

16 Mr. Bundy asked for 30 days to confirm new counsel. The court denied this request and  
17 initially gave him two weeks, setting the matter for a status and confirmation of counsel hearing  
18 on October 13, 2016. The court also indicated it would require Mr. Hansen to remain as counsel  
19 of record to insure continuity for a 30-day transition period. Mr. Hansen sent the court a letter on  
20 October 12, 2016, stating that Cliven Bundy was indigent and suggesting the court should appoint  
21 counsel.

22 At the October 13<sup>th</sup> hearing, Mr. Hansen did not appear. The court was told that Mr.  
23 Hansen had traveled out of state on another case. Attorney Bret Whipple filed a notice of  
24 association of counsel and appeared indicating he had been retained by Mr. Bundy to file pretrial  
25 motions. The court inquired whether Mr. Bundy was asking that the court appoint counsel for him  
26 inasmuch as Mr. Hansen's letter suggested he was indigent. Mr. Bundy was advised that if he  
27 intended to apply for court-appointed counsel, he would be required to fill out a CJA financial  
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1 affidavit under penalty of perjury. Mr. Bundy indicated he understood, and hoped to be able to  
2 retain counsel. The court continued the matter until 3:00 pm the same day.

3 At the continued 3:00 pm hearing, Mr. Bundy had not filled out the CJA financial affidavit.  
4 The court was handed an unsigned CJA financial affidavit that Mr. Whipple told the court was  
5 based on information obtained about Mr. Bundy's financial status from his wife, Carol Bundy. On  
6 reviewing the unsigned form, it was clear that Mr. Bundy did not qualify for court-appointed  
7 counsel. Mr. Bundy addressed the court and stated that he had never applied for any form of public  
8 assistance, his children had never had any free school lunches, and he would like to see if he could  
9 "pay his own way" and retain counsel. He indicated that his problem was that he did not have  
10 cash flow. The court pointed out that the financial information his wife provided indicated he had  
11 substantial assets including a significant amount of cash on hand, and that cash flow was not the  
12 criteria for determining whether he qualified for court appointed counsel. The court explained that  
13 Mr. Bundy needed to make the necessary arrangements to retain counsel soon because he was  
14 joined for trial with his co-defendants who were set for trial February 6, 2017, substitute counsel  
15 would need sufficient time to prepare, and further delay could affect the co-defendants desire to  
16 proceed to trial. The court continued the hearing for confirmation of counsel until October 21,  
17 2016.

18 On October 21, 2016, attorney Jeb Bond appeared on behalf of Brett Whipple indicating  
19 Mr. Whipple had flown to Oregon to watch proceedings in the Oregon prosecution. However, Mr.  
20 Bond represented that negotiations for representation were nearly complete and should be finalized  
21 within a matter of days. Mr. Bundy agreed and stated he was confident he would be able to reach  
22 an agreement with Mr. Whipple to represent him. Based on these representations the court granted  
23 an extension and continued the hearing to October 26, 2016. Mr. Bundy asked, through Mr. Bond,  
24 that the court waive his appearance if Mr. Whipple filed a notice of appearance in compliance with  
25 the Local Criminal Rules. The court inquired if this was Mr. Bundy's request. Mr. Bundy stated  
26 he would rather not be transported from the detention facility and spend all day in the Marshal's  
27 lockup if counsel filed a notice of appearance. The court granted his request. On October 24, 2016,  
28 Mr. Whipple filed a Notice of Appearance of Counsel (ECF No 912) stating he had been "retained

1 by the defendant Cliven Bundy as his counsel of record, for the purpose of full representation  
2 throughout the duration of trial....” The court therefore vacated the hearing. In short, Mr. Bundy  
3 has been continuously represented by counsel.

4 With respect to his remaining claims, Mr. Bundy initially stipulated this was a complex  
5 case that should be set for trial in February 2017. He stipulated “that all time from the entry of  
6 Defendants’ pleas in this case until the trial of this matter is excluded for purposes of the STA  
7 pursuant to 18 U.S.C. § 3161(h)(7)(A) as the ends of justice outweigh the interest of the public in  
8 a speedy trial.” He subsequently changed his mind between the time the Propose Complex Case  
9 Schedule (ECF No 270) was filed on April 18, 2016, and the April 22, 2016 hearing. He has also  
10 changed his mind about a number of other things, including whether he should be tried separately  
11 or joined for trial with all of his co-defendants. Most recently, in opposition to the government’s  
12 motion to sever this case into three groups for three separate trials, Mr. Bundy asked to be jointly  
13 tried with all of his co-defendants on February 6, 2017. However, he asked that if the court was  
14 going to order some form of severance, that he go to trial last to allow his co-defendants to be tried  
15 before him because he had the wherewithal to sustain his family while awaiting trial.

16 Mr. Bundy did not file objections or appeal the court’s findings in its April 26, 2016 Case  
17 Management Order (ECF No 321) that this was a complex case and excluding and tolling the time  
18 for bringing the matter for trial under the provisions of the Speedy Trial Act cited in the order.  
19 The government also correctly points out that Mr. Bundy’s interlocutory appeal of the district  
20 judge’s order denying Mr. Klayman’s application for admission to practice pro hac vice in this  
21 case also tolls the time for bringing the case for trial under the Speedy Trial Act. *See* 18 U.S.C.  
22 § 3162(h)(1)(C). Although the Ninth Circuit denied his petition for a writ of mandamus to direct  
23 the district judge to admit Mr. Klayman, Mr. Bundy has a pending petition for rehearing en banc.

24 For the reasons explained, Mr. Bundy’s Sixth Amendment right to counsel of his choosing  
25 and to a speedy trial have not been violated. Additionally, as his current counsel timely filed a  
26 motion to dismiss challenging the court’s subject matter jurisdiction (within the two-week  
27 extension the court sua sponte granted), and has now indicated he has no intention of filing any  
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1 additional motions that would delay the trial, his motion for an extension of time to file pretrial  
2 motions will also be denied.

3 **IT IS ORDERED** that Cliven D. Bundy's Second Motion to Continue Rule 12 Motion  
4 Filing Deadline (ECF No. 889) is **DENIED**.

5 **IT IS RECOMMENDED** that Cliven D. Bundy's Motion to Dismiss (ECF No. 891) be  
6 **DENIED**.

7 DATED this 22nd day of December, 2016.

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10 PEGGY A. LEEN  
11 UNITED STATES MAGISTRATE JUDGE  
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